

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TODD ANTHONY FOREMAN,

Defendant-Appellant.

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UNPUBLISHED  
February 20, 2007

No. 265244  
Barry Circuit Court  
LC No. 05-000106-FH

Before: Fort Hood, P.J., and Smolenski and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84; conspiracy to commit assault with intent to do great bodily harm less than murder, MCL 750.84 and MCL 750.157a; and felonious assault, MCL 750.82. Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to 6 to 15 years' imprisonment for each conviction. Defendant appeals as of right. We affirm defendant's convictions for assault with intent to do great bodily harm and conspiracy to commit assault with intent to do great bodily harm. However, we vacate defendant's conviction for felonious assault as violative of defendant's right to be free from double jeopardy.

Early on the morning of November 25, 2004, defendant and two acquaintances, Kevin Slack and Manuel Torres, were in Torres's truck, driving in the victim's hayfield doing "donuts." The victim got into his own truck and followed them. With the victim in pursuit, the three assailants decided to stop and "beat up" the victim. When the victim got out of his truck, defendant grabbed him from behind. Defendant held the victim and instructed Slack to kick him in the stomach. At the same time, Torres hit the victim over the head three or four times with a 12- to 14-inch "Mag" flashlight.

Defendant argues on appeal that his conviction for both felonious assault and assault with intent to do great bodily harm for one assault with a single victim violated his double jeopardy rights. We agree.

The purpose of the double jeopardy protection against multiple punishments for the same offense is to protect a defendant's interest in not enduring more punishment than was intended by the Legislature. *People v Calloway*, 469 Mich 448, 451; 671 NW2d 733 (2003). Whether defendant's double jeopardy rights have been violated involves a determination of legislative intent as a matter of statutory construction. *People v Dillard*, 246 Mich App 163, 166; 631

NW2d 755 (2001). This is an issue that we review de novo. *People v Ford*, 262 Mich App 443, 446; 687 NW2d 119 (2004). In doing so, we consider whether each statute prohibits conduct violative of a social norm distinct from the norm protected by the other, the amount of punishment authorized by each statute, whether the statutes are hierarchical or cumulative, the elements of each offense, and any other factors that are indicative of legislative intent. *People v Denio*, 454 Mich 691, 708; 564 NW2d 13 (1997). Where one statute incorporates most of the elements of a base statute and the penalties increase from the base statute, it is evidence that the Legislature did not intend punishment under both statutes. *People v Robideau*, 419 Mich 458, 487-488; 355 NW2d 592 (1984).

The felonious assault statute provides:

(1) Except as provided in subsection (2), a person who assaults another person with a gun, revolver, pistol, knife, iron bar, club, brass knuckles, or other dangerous weapon without intending to commit murder or to inflict great bodily harm less than murder is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than \$2000.00, or both. [MCL 750.82.]

The statute proscribing assault with intent to do great bodily harm less than murder provides:

Any person who shall assault another with intent to do great bodily harm, less than the crime of murder, shall be guilty of a felony punishable by imprisonment in the state prison not more than 10 years, or by fine of not more than 5,000 dollars. [MCL 750.84.]

Both statutes address the same social norm: the right of persons to be free from assaults. The assault with intent to do great bodily harm statute provides a harsher punishment and higher fine than the felonious assault statute, and the two statutes are of a hierarchical nature. Nevertheless, there is no violation of double jeopardy protections if one crime is complete before the other takes place, even if the offenses share common elements or one constitutes a lesser offense of the other. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995). Thus, if a felonious assault took place before an assault with intent to do great bodily harm, there is no double jeopardy violation. In this case, the evidence supported only one continuous assault. Defendant continuously held the victim while one accomplice kicked him, and the other accomplice hit him with a flashlight. The victim testified that, *while* the third assailant was kicking him, he saw Torres with the flashlight raised over his head. Torres then brought the flashlight down on him three or four times. The victim also testified that the assailants were “hittin’ me and kickin’ me.” There is no indication that the kicking assault was completed before the assault with the flashlight began. Therefore, defendant’s convictions for both assault with intent to do great bodily harm and for felonious assault violate the protections against double jeopardy in this case.

The normal remedy for conviction of multiple offenses in violation of double jeopardy rights is to vacate the lower charge. *People v Herron*, 464 Mich 593, 609; 628 NW2d 528 (2001). We therefore remand, and direct the trial court to vacate defendant’s conviction for felonious assault.

Defendant next argues on appeal that he received the ineffective assistance of counsel. This Court reviews claims of ineffective assistance of counsel to determine whether defendant

has shown that counsel's performance fell below an objective standard of reasonableness and that the representation prejudiced defendant such that he was deprived of a fair trial. See *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

The first of the four bases upon which defendant claims ineffective assistance is that counsel failed to effectively cross-examine Torres, the accomplice witness. We disagree. A decision with respect to cross-examining a witness is regarded as a matter of trial strategy. *People v Hopson*, 178 Mich App 406, 412; 444 NW2d 167 (1989). The failure to call witnesses or present other evidence constitutes ineffective assistance of counsel only when it deprives the defendant of a substantial defense, *id.*, which might have made a difference in the outcome of the trial. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1994).

Defendant specifically argues that counsel failed to elicit the same information from Torres at trial as she did during the preliminary examination. However, Torres's preliminary examination testimony was not substantially different than the testimony elicited at trial. He testified on both occasions that the three assailants agreed together to assault the victim, and defendant has not demonstrated that additional cross-examination would deprive him of a substantial defense. To overcome the presumption that counsel's strategy was sound, defendant must show that counsel's omission deprived him of valuable evidence that would have been of substantial benefit. *People v Bass*, 223 Mich App 241, 252; 565 NW2d 897 (1997), vacated in part on other grounds 457 Mich 866 (1998). Testimony that defendant was unaware that Torres was armed with a flashlight was not valuable evidence that would have been of substantial benefit because felonious assault is not a specific intent crime. *People v Johnson*, 407 Mich 196, 228; 284 NW2d 718 (1979). Further, the prosecution only needed to show a general criminal intent to commit an unlawful act necessary for simple assault. *Id.* The evidence showed that defendant held the victim from behind while Slack kicked him and Torres hit him with a flashlight. Therefore, defendant's lack of knowledge regarding whether Torres was armed was irrelevant.

Defendant's second basis for his claim of ineffective assistance of counsel is that counsel failed to request a jury instruction that the jury could not find defendant guilty of both felonious assault and assault with the intent to commit great bodily harm. Although conviction under both statutes violated defendant's rights against multiple punishments, counsel was not ineffective. Defendant was charged with both crimes, and defendant has failed to cite any authority to support that the instruction he claims should have been given was appropriate. Defendant has failed to demonstrate that his counsel's conduct fell below an objective standard of reasonableness.

Defendant next claims ineffective assistance because his counsel failed to present evidence that the victim's injuries were not sufficiently serious to constitute great bodily harm because they were not permanent or serious. However, no evidence of an actual physical injury is required to convict a defendant of assault with intent to do great bodily harm less than murder. *People v Harrington*, 194 Mich App 424, 430; 487 NW2d 479 (1992); *People v Pena*, 224 Mich App 650, 659; 569 NW2d 871 (1997), mod in part on other grounds 457 Mich 885 (1998). Further, the evidence presented at trial was that defendant held the victim down while his two associates beat him. Defendant's argument is without merit.

The final basis upon which defendant claims ineffective assistance is that his counsel failed to present evidence of the penalties faced by Torres if he had not taken a plea agreement. At trial, defense counsel highlighted the fact that Torres originally denied all involvement, and that his testimony was required by his plea agreement. “A difference in trial tactics does not amount to ineffective assistance of counsel.” *People v Nickson*, 120 Mich App 681, 685; 327 NW2d 333 (1982).

Finally, defendant argues that the trial court erred by instructing the jury that great bodily harm means an injury that *could* cause serious and permanent harm. However, this issue was not preserved at trial by timely objection. MCR 2.516(C). Further, defense counsel expressed satisfaction with the instructions. Appellate review of the issue has therefore been waived. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). Even if he were to address the issue, defendant has failed to show that the issues for trial were not fairly presented or that his rights were not sufficiently protected. *People v McLaughlin*, 258 Mich App 635, 668; 672 NW2d 860 (2003).

Affirmed, but remanded to the trial court with instructions to vacate defendant’s felonious assault conviction. We do not retain jurisdiction.

/s/ Karen M. Fort Hood  
/s/ Michael R. Smolenski  
/s/ Christopher M. Murray